No. 98-1189

IN THE
Supreme Court of the United States

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, *et al.*,
Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN CENTER FOR LAW AND JUSTICE SUPPORTING RESPONDENTS

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is a nonprofit, public interest law firm and educational organization dedicated to protecting religious liberty, human life, and the family. ACLJ attorneys have argued or participated as amicus curiae in this Court. *See, e.g., Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993); *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993); *United States v. Kokinda*, 497 U.S. 720 (1990); *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Frisby v. Shultz*, 487 U.S. 474 (1988); *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987).

The ACLJ, because of its commitment to defending religious liberty and free speech, opposes the government compelling individuals to support political ideology which is religiously and philosophically abhorrent to them. The ACLJ is generally not in favor of state universities compelling students to contribute to groups with which they are ideologically opposed. Thus, the ACLJ urges this Court to uphold the decision of the United States Court of Appeals for the Seventh Circuit below.

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[1] Counsel of record for the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of Court pursuant to Rule 37. Pursuant to Rule 37.6, amicus ACLJ discloses that no counsel for any party in this case authored in whole or in part this brief and that no mandatory contribution to the preparation of this brief was received from any person or entity other than *amicus curiae*.

SUMMARY OF ARGUMENT

Petitioner Board of Regents University of Wisconsin System and supporting amicus argue that this case presents issues involving the historical right of universities to academic freedom, however, that is inaccurate on two levels.

First, as a purely historical matter, American universities started using student fees for ideological purposes only fairly recently. Accordingly, if "a page of history is worth a volume of logic,"[2] then the history of this country reflects that this practice is not necessary for academic freedom at public institutions of learning.

Second, compelling someone to disseminate beliefs which are contrary to his own, is a fundamental violation of virtually every right in the First Amendment to the U.S. Constitution. Thus, while it is discriminatory to limit access to student funds because of a particular viewpoint, compelling association with an ideology is equally unconstitutional.

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[2] Comm. for Public Ed. and Rel. Lib. v. Nyquist, 413 U.S. 756, 777 n.33 (1973).

ARGUMENT

I. USE OF STUDENT FEES FOR IDEOLOGICAL PURPOSES IS A RELATIVELY RECENT PHENOMENON

Many groups argue to this Court that unless students are compelled to support causes and groups which are ideologically abhorrent to them, a historically permitted use of student fees will come to an abrupt end. That is an historically inaccurate depiction.

Historically, student fees were not used to support ideological activities. Instead, such fees funded core educational activities and capital improvements. *Cf. Litchman v. Shannon*, 155 P. 783 (Wash. 1916) (student fees used for construction of two buildings); *Lynch v. Comm'r of Ed.*, 56 N.E.2d 896 (Mass. 1944) (student fees used for books and school supplies); *Regents of University System of Georgia v. Page*, 18 F.Supp. 62 (N.D. Ga. 1937) (students fees used for athletic programs); *President and Fellows of Harvard College v. Attorney General*, 117 N.E. 903 (Mass. 1917) (student fees used for applied sciences); *Rainey v. Malone*, 141 S.W.2d 713 (Tex. 1940) (student fees used for student union facility); *Clipson v. State Board of Education*, 123 So. 2d 16 (Ala. 1960) (student fees used for construction of physical education building); *Iowa Hotel Association v. State Board of Regents*, 114 N.W.2d 539 (Iowa 1962) (student fees used for construction and renovation of buildings); *Spence v. Utah State Agricultural College*, 225 P.2d 18 (Utah 1950) (student fees used to pay principal and interest of construction bonds).

In an early Illinois case, it was necessary to determine whether the construction and maintenance of dormitories, dining facilities, and a student club house were for the "immediate conduct of the educational purposes of the institution," or rather for the purpose of producing revenue. *City of Chicago v. The University of Chicago*, 81 N.E. 1138, 1139 (Ill. 1907). While students contributed specifically to the maintenance of each of these facilities through rent, meal fees and membership dues, each facility was also supported generally by revenue from general student fees. Examining the historical background of American higher education, the court found dormitories and dining halls to have been an essential part of American universities since the American colonies began founding universities in the seventeenth century. The court similarly found the clubhouse, used for recreation and social purposes as well as various student meetings, much like today's student unions, to be maintained for the immediate conduct of the educational purposes of the institution. In discussing the application of student fees for the support of these facilities, the court declined to distinguish between a general student fee and one "apportioned as to sources of expense, as tuition, room rent, lecture fee, dining halls, etc." *Id.* at 1139–1140 (internal citations omitted).

In addition to the general university purposes discussed above, student fees during this time period were also used for the creation and maintenance of a student athletic association, specific scientific research projects, and the establishment of a campus student union. *See Regents of University System of Georgia v. Page*, 18 F.Supp. 62 (N.D. Ga., 1937) (a student fee imposed on all students was used to support the University of Georgia Athletic

Association and the Georgia Tech Athletic Association); *President and Fellows of Harvard College v. Attorney General*, 117 N.E. 903 (Mass. 1917) (student fees assessed in conjunction with specific courses were to be used in education generally and also for specific research in the Applied Sciences); *Rainey v. Malone*, 141 S.W.2d 713 (Tex. App. 1940) (student fee used to establish student union). In *Rainey* the court specifically addressed the issue of whether the legislature could legitimately authorize collection of the "Student Union Fee," as being "appropriately within the functions of a present day university." *Id. at 717* The Court found the Student Union to satisfy the functions of the university, providing "facilities for the conduct of various extra-curricular activities of social, recreational and educational natures; all of which are conducted or supervised under the direction of the Board of Regents in accordance with the above Subsection 19," which provides that the Board of Regents shall review annually all activities conducted and expenditures made during the previous year before approving the budget for the following year.

Thus, contrary to the assertions of some, use of student fees to support ideological causes and groups is of fairly recent vintage. In fact, some universities are prohibited from using student fees for political purposes. *See, e.g., Smith v. Regents of the University of California*, 844 P.2d 500, 515 n. 11 (Cal. 1993) ("Positions on issues taken by student governments shall not be represented as or deemed to be official positions of the University. Compulsory student fees shall not be expended in support of such positions except for University-related purposes").

A dramatic increase in student fee litigation arising in the 1970's shows the new and controversial uses of student fee money. In that decade alone, sixty state and federal cases containing a discussion of student fees were decided. The subject matter of this new litigation marked a significant departure from the early student fee cases. No longer were the challenges focused upon statutory authority to assess student fees, but rather the focus had shifted to the new purposes for which the fees were being expended. In each case, challenged expenditures fell within one of four categories.

Many of these student fee cases involved the expenditure of student fees for support of a campus newspaper advocating views offensive to some students, or containing explicit material offensive to students. *See, e.g., Arrington v. Taylor*, 380 F.Supp. 1348 (M.D.N.C. 1974), aff'd by the Fourth Circuit in an unpublished decision on August 4, 1975 (1975 U.S. App. LEXIS 13313); *Larson v. Board of Regents of the Univ. of Nebraska,* 204 N.W.2d 568 (Neb. 1973); *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973).

Revisiting the issue first raised in 1969 by *Brooks v. Auburn University*, other cases involved a challenge to student fees being expended to fund controversial speakers in university guest lecturer programs. *See, e.g., Veed v. Schwartzkopf*, 353 F.Supp. 149 (D.C. Neb. 1973) (also challenging use of fees for student newspaper and student association); *Lace v. University of Vermont and State Agricultural College*, 303 A.2d 475 (Vt. 1973).

The third issue around which much controversy centered was the use of student fees for the funding of

contraceptive devices and drugs on campus. *See, e.g., Bond v. Virginia Polytechnic Inst. & State University*, 381 F.Supp. 1023 (1974); *Associated Students for the Univ. of California at Riverside v. AG of the United States*, 368 F.Supp. 11 (N.D. Ca. 1973). Although the case did not directly involve the payment of student fees to a student organization, this Court discussed the distinction between providing a forum for student organizations and affirmatively subsidizing their activities, recognizing that refusal to subsidize an organization's speech may substantially limit its ability to participate in the forum. *Healy v. James*, 408 U.S. 169 (1972).

The remainder of the decade saw the rise of litigation over the expenditure of student fees for the support of various groups whose express purpose was ideological and political advocacy. *See, e.g., Curran v. Benezet*, 360 N.Y.S. 2d 582 (1974); *Uzzell v. Friday*, 401 F.Supp. 775 (M.D.N.C. 1975) (payment of student fees in support of Black Student Movement, a student group whose purpose was the promotion of separate racial and cultural identity for black students).

Since the 1970s, the controversy surrounding student fee cases has not diminished, as evidenced by the ever-increasing amount of litigation. In contrast to the early cases in which student fees were used to fund building projects, student unions, and athletic associations, the vast majority of recent student fee cases have been centered on the expenditure of the funds for religious, political, or ideological purposes. While this survey of the history of student fees in the court system does not provide a comprehensive study of the history of student fees in America, it may be relied upon as evidence of the original

purposes for which student fees were collected, and the present-day trend toward support of political and ideological advocacy which began during the late 1960s and extended through the 1970s.

II. REGARDLESS OF THE FACT THAT IDEOLOGICAL USE OF STUDENT FEES IS A RECENT PHENOMENON, COMPELLED IDEOLOGICAL ASSOCIATION IS UNCONSTITUTIONAL.

The vintage of the compelled associational policies at issue here are irrelevant for constitutional purposes. This case turns on the issue of whether the State, under the guise of compelled student fees, can force someone to help propagate ideas to which he is diametrically opposed. Compelling a man to disseminate beliefs contrary to his own, fundamentally violates of virtually every right in the First Amendment to the U.S. Constitution.

As this Court said in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943):

> But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

This standard was reiterated in *Wooley v. Maynard*, 430 U.S. 705 (1977): "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." 430 U.S. at 714 (citations and quotation marks omitted). Thus, compelling someone to adhere to another's moral judgment on one of the most controversial issues of the day is unconstitutional.

This Court has repeatedly ruled that the government may not constitutionally force people to state messages with which they disagree. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (state law requiring newspapers to print response by political candidates unconstitutional); *Wooley v. Maynard*, 430 U.S. 705 (1977) (Jehovah's Witnesses cannot be forced to have state motto on their auto licenses, when the drivers disagree with the state motto); *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1974) (teacher in agency shop cannot by compelled to contribute to union activities that disseminate points of view the teacher finds offensive); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (Jehovah's Witnesses cannot be punished for refusing to say the Pledge of Allegiance in public school); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (member of a mandatory state bar cannot be compelled to pay for bar association advocacy with which the individual member disagrees).

In *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 524 (1985), this Court enunciated

the simple principle that coerced adherence to ideology is unconstitutional: "The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspects." 471 U.S. at 559.

Arguments are raised in this case that the university acting as a neutral conduit for student fees distribution diffuses arguments about compelled association. This Court in *Pacific Gas and Electric v. California Public Utilities Commission of California*, 475 U.S. 1 (1986), however, said that the relevant question was not *how* the compelled association occurred, but *whether* it had occurred:

> The constitutional difficulty with the right-of-reply statute [in Tornillo] was that it required the newspaper to disseminate a message with which the newspaper disagreed. The difficulty did not depend on whether the particular paper on which the replies were printed belonged to the newspaper or to the candidate.

475 U.S. at 18. Therefore, the fact that the University of Wisconsin is willing to dole out student fees to a variety of groups does not remove the students from the process. It is still the students who must pay for activities and the dissemination of messages with which they do not agree.

In *NAACP v. Alabama*, 357 U.S. 449 (1958), this Court stated that a separate and distinct constitutional right to freedom of association exists emanating from the First Amendment to the U.S. Constitution. Likewise, in *Shelton*

v. Tucker, 364 U.S. 479 (1960), this Court said that the right of free association is "closely allied with freedom of speech and is a right which, like free speech, lays at the foundation of a free society." *Id.* at 486.

This fundamental right is not susceptible to indirect governmental infringement through a university's purported interest in propagating a marketplace of ideas. As this Court stated in *Bates v. Little Rock*, 361 U.S. 516 (1959):

> [I]t is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States. *Freedoms such as these are protected not only against heavy handed frontal attack, but also from being stifled by more subtle governmental interference.*

Id. at 523 (emphasis added).

Freedom of association includes the right not to be forced either directly or indirectly (as here) by the state to associate with ideas or beliefs that are contrary to one's own. Thus, in *Wooley v. Maynard*, 430 U.S. 705 (1977), the state could not force an individual to associate himself with a motto which he opposed by carrying that motto on his automobile.

In *Wooley*, a follower of the Jehovah's Witness faith objected to the New Hampshire State motto, "Live Free or Die," which was embossed on his license plates in accordance with state law. Because he found the motto abhorrent to his religious beliefs, George Maynard obscured the message on the license plate. Maynard was

subsequently prosecuted, fined and given a six month suspended sentence for purposefully obscuring the state motto. *Wooley*, 430 U.S. at 710. This Court upheld Maynard's challenge to the motto requirement in *Wooley*, reaffirming the fundamental constitutional opposition to governmentally-coerced speech from individuals:

> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all . . . *A system which secures the right to proselytize religious, political and ideological causes must also guarantee the concomitant right to decline to foster such concepts*. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."

430 U.S. at 714 (citations omitted). Accordingly, the freedom to expend money for ideological causes and the freedom to decline to expend money for other ideological causes are two sides of the same constitutional coin.

Similarly, in *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977), this Court held that it is unconstitutional for people to be compelled to contribute union dues towards political and ideological causes in which they do not believe. If it is clear that the "government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment," *Abood,* 431 U.S. at 233, it is equally clear that a student's associational rights may not be predicated

upon relinquishment of those rights. As the *Abood* court unambiguously held:

> The fact that appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections. . . .

431 U.S. at 234-35 (citations omitted).

These associational principles prohibit a State from compelling any individual to affirm his belief in God, *Torasco v. Watkins*, 367 U.S. 488 (1961), or to associate with a political party, *Elrod v. Burns*, 427 U.S. 347, 363-64 (1976), as a condition for employment. Consequently, the First Amendment precludes the state from forcing a student to associate with groups and messages which offend his religious and moral beliefs.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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Dated: August 11th, 1999